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U.S. Citizenship  
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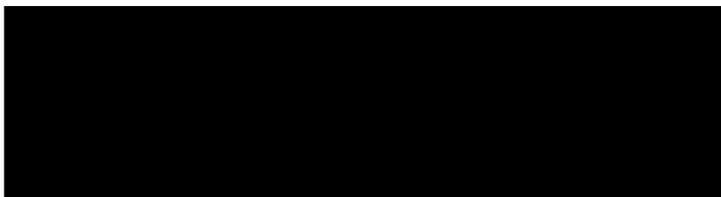
Date: SEP 19 2007

IN RE:



APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(C)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(C)(ii)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The District Director, Baltimore, Maryland, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, the previous decision of the district director will be withdrawn and the application declared moot.

The applicant is a native and citizen of Guatemala who, on January 22, 1996, filed an Application for Asylum or Withholding of Removal (Form I-589). On March 14, 1996, the applicant's asylum application was referred to an immigration judge and the applicant was placed into proceedings. On March 19, 1997, the immigration judge granted the applicant voluntary departure until June 17, 1997. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal. The applicant filed a request for extension of her voluntary departure, which was granted until July 25, 1997 and the warrant for the applicant's removal was cancelled. On July 25, 1997, the applicant left the United States and returned to Guatemala. On February 28, 2002, the applicant married her spouse, [REDACTED]. On January 28, 2002, a Petition for Alien Worker (Form I-140) on behalf of [REDACTED] was approved. On June 10, 2002, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on the approved Form I-140. On March 31, 2004, the applicant appeared at Citizenship and Immigration Services' (CIS) Baltimore, Maryland District Office. The applicant testified that she entered the United States without inspection or admission in September 1997. On June 10, 2002, the applicant filed the Form I-212. The district director denied the Form I-212 finding the applicant inadmissible under section 212(a)(9)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C). The applicant seeks permission to reapply for admission into the United States under section 212(a)(9)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(C)(ii) in order to reside in the United States with her lawful permanent resident spouse and U.S. citizen children.

The district director determined that the applicant was an alien who required permission to reapply for admission into the United States. The district director determined that the applicant was not eligible to file for permission to reapply for admission because she is inadmissible under section 212(a)(9)(C) of the Act and had not remained outside the United States for a period of ten years prior to her submitting her application. The district director also determined that section 241(a)(5) of the Act applies in this matter. The district director denied the Form I-212 accordingly. *See District Director's Decision* dated June 9, 2006.

On appeal, counsel contends that the applicant is not inadmissible pursuant to section 212(a)(9)(C) of the Act. Counsel contends that the applicant is not subject to section 241(a)(5) of the Act because she did not depart the United States under an order of removal. Alternatively, counsel contends that the applicant is entitled to seek a *nunc pro tunc* permission to reapply for admission. *See Form I-290B*, dated July 11, 2006. The Form I-290B indicated that counsel would submit a separate brief or evidence on appeal within 90 days. On August 10, 2007, the AAO informed counsel that he had five days in which to provide additional documentation to support the appeal. On August 16, 2007, counsel responded that he had not submitted a brief and/or additional evidence to support the appeal. The record is, therefore, considered complete.

The AAO finds that the applicant is not inadmissible under sections 212(a)(9)(A) or 212(a)(9)(C) of the Act and she is, therefore, not required to receive permission to reapply for admission at this time.

Section 212(a) of the Act states in pertinent part:

(A) Certain aliens previously removed.-

(i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens.- Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case on a alien convicted of an aggravated felony) is inadmissible.

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission.

....

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.- Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.- Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be

readmitted from a foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

- (1) the alien's having been battered or subjected to extreme cruelty; and
- (2) the alien's--
  - (A) removal;
  - (B) departure from the United States;
  - (C) reentry or reentries into the United States; or
  - (D) attempted reentry into the United States.

The district director based the finding of inadmissibility under section 212(a)(9)(C) of the Act on the applicant's admission to having been ordered removed from the United States on July 28, 1997. The record reflects that the applicant's voluntary departure was extended and the warrant of removal was cancelled. The cancelled warrant indicates that the applicant departed the United States on July 25, 1997, prior to expiration of her extended voluntary departure. The AAO further finds that the applicant did not accrue unlawful presence. Grants of voluntary departure toll the accrual of unlawful presence. *See Memorandum by [REDACTED] Executive Associate Commissioner, Office of Field Operations* dated June 12, 2002. The applicant was granted voluntary departure prior to April 1, 1997, the date of the enactment of the unlawful presence provisions of the Act, and departed as required. As such, the AAO finds that the applicant is not subject to a final order of removal, was not removed under an order of removal, did not depart the United States under an order of removal, did not accumulate more than one year of unlawful presence and is, therefore, not inadmissible pursuant to either section 212(a)(9)(A) or 212(a)(9)(C) of the Act.

On appeal, counsel contends that section 241(a)(5) of the Act does not bar the applicant from re-admission because she did not depart the United States under an order of removal.

Section 241(a) of the Act states in pertinent part:

- (5) Reinstatement of removal orders against aliens illegally reentering. If the Attorney General [now the Secretary of Homeland Security, "Secretary"] finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

As discussed above, the AAO finds that the applicant has not departed the United States under an order of removal and she is, therefore, not subject to reinstatement of a removal order.

The AAO therefore finds that the applicant is currently not required to apply for permission to reapply for admission to the United States because there is no evidence in the record that the applicant is subject to a final order of removal or has ever been removed from the United States. Since the applicant does not require permission to reapply for admission, the appeal will be dismissed, the decision of the district director will be withdrawn and the application for permission to reapply for admission application will be declared moot.

**ORDER:** The appeal is dismissed, the decision of the district director is withdrawn and the application for permission to reapply for admission is declared moot.